



THE ATTORNEY GENERAL OF TEXAS

CRAWFORD C. MARTIN
ATTORNEY GENERAL

AUSTIN, TEXAS 78711

April 29, 1971

Honorable Neal Solomon, Chairman
Committee on Banks and Banking
House of Representatives
State Capitol
Austin, Texas

Opinion No. M-846

Re: Constitutionality
of House Bill No.
1410, 62nd Leg., R.S.,
1971, authorizing
state banks to in-
crease their capital
stock without the
issuance of same.

Dear Mr. Solomon:

You have requested our opinion concerning the constitutionality of House Bill No. 1410 currently pending in the 62nd Legislature, Regular Session, 1971, which reads as follows:

"A BILL TO BE ENTITLED AN ACT amending Chapter III of the Texas Banking Code of 1943, same being Chapter 97, Acts of the 48th Legislature, Regular Session, 1943, by adding a new article to be designated as Article 12a and to be codified as Article 342-312a Vernon's Texas Civil Statutes; permitting state banks to authorize and provide authorized but unissued stock, with certain restrictions and limitations; and declaring an emergency.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

"Section 1. Chapter III of The Texas Banking Code of 1943, as amended, is hereby amended by adding a new article immediately following Article 12 to be designated as Article 12a which shall read as follows:

'Article 12a. Authorized But Unissued Stock.

'a. Any state bank, with the approval of the Commissioner and by vote of stockholders owning two-thirds of the stock of the bank entitled to

vote, may authorize an increase in the stock of the bank in the category of authorized but unissued stock, except that the approval of the Commissioner shall not be required where the resulting amount of stock in the category of authorized but unissued stock will satisfy either of the following criteria:

'(1) Where the resulting total amount of authorized but unissued stock will be free of preemptive rights of shareholders, will not exceed five percent (5%) of the currently issued and outstanding stock, and is specifically designated as being reserved for issuance in connection with an officer or employee stock option plan, provided that such plan has been approved by the Commissioner.

'(2) Where the resulting total amount of authorized but unissued stock, exclusive of that amount specifically reserved for issuance in connection with an approved officer or employee plan, will be subject to preemptive rights of shareholders and will not exceed fifty percent (50%) of the currently issued and outstanding stock.

'b. With the written approval of the Commissioner, authorized but unissued stock may be issued from time to time as stock dividends or for such other purposes and considerations as may be approved by the board of directors of the bank.

'c. Authorized but unissued stock may also be issued from time to time to officers or employees of the bank pursuant to an approved stock option plan adopted in accordance with Article 12 of this Chapter, or in exchange for convertible capital notes or debentures previously approved by the Commissioner in accordance with the terms and provisions of such securities.

'd. Nothing contained herein shall be construed as relieving any bank of the obligation to file with the Commissioner, pursuant to Article 12 of this Chapter, a copy of every amendment to the Articles of Association adopted by the shareholders.'

"Section 2. The need for modernization and clarification of the Texas Banking Code of 1943, so that

banks may better serve their communities, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended; and that this Act shall take effect and be in force from and after its passage, and it is so enacted."

Article XVI, Section 16 of the Constitution of Texas reads in part as follows:

"The Legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof.

"No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash." (Emphasis added)

". . ."

It appears from a reading of House Bill No. 1410, supra, that this bill would authorize a state bank to increase its capital stock without requiring an increase in the capital assets, and without issuing such stock, but holding the same for issuance for certain purposes.

It is clear that the intent and purpose of the emphasized section of the Constitution, quoted above, is to require that banking corporations be adequately financed and that their capital stock not be diluted in value.

When a banking corporation amends its charter to increase its capital stock then such charter as amended becomes the bank's charter. In accord, see Furr v. Chapman 286 S.W. 171, 172, (Tex.Comm.App. 1926, mod. on other grounds 287 S.W. 496). It is our view that to permit the enactment of House Bill No. 1410 would be to approve the possible dilution of a bank's capital stock, when such dilution was forbidden at the time of the initial issuance of its charter. It is the opinion of

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this office that the Legislature does not have the power to authorize such a dilution.

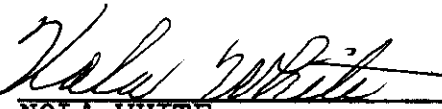
In view of Article XVI, Section 16 of the Constitution of Texas, which provides that all of the authorized capital stock must be subscribed and paid for in full in cash, we are of the opinion that House Bill No. 1410 is unconstitutional.

S U M M A R Y

House Bill No. 1410, 62nd Legislature, Regular Session, 1971, authorizing a state bank to increase its capital stock without issuing same, is unconstitutional and in violation of Article XVI, Section 16 of the Constitution of Texas, which requires all authorized capital stock to be subscribed and fully paid for in cash.

Very truly yours,

CRAWFORD C. MARTIN
Attorney General of Texas

By: 
NOLA WHITE
First Assistant Attorney
General

Prepared by John H. Banks
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Kerns Taylor, Chairman
W. E. Allen, Co-Chairman

Malcolm Quick
S. J. Aronson
Jack Sparks
Fisher Tyler

MEADE F. GRIFFIN
Staff Legal Assistant

ALFRED WALKER
Executive Assistant